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In the Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT S. HART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MERVYN HAMBURG,
SARA CRISCITELLI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 551 F. 2d 738.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1977. A petition for rehearing was denied on May 19, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on July 8, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner and his co-defendant, an officer of a national bank, violated 18 U.S.C. 1005 by causing entries to be made in the bank's ledgers that did not accurately portray the nature of their interest in stock transactions with the bank.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy to make false entries in the books of a national bank and to misapply money and securities of the bank, in violation of 18 U.S.C. 371, and seven substantive counts of making false entries, in violation of 18 U.S.C. 1005.[1] He was sentenced to a total of 21 months' imprisonment, all but three months of which were suspended in favor of probation. The court of appeals affirmed (Pet. App. A).

The evidence, which is not in dispute, is set forth in the opinion of the court of appeals. It shows that, at all times relevant to the charges in the indictment, petitioner was chairman of the board of A.S. Hart & Co., an investment firm in Memphis, Tennessee, and co-defendant William Grissom was vice-president of the Union Planters National Bank of Memphis, in charge of the bank's investment division (G.X. 7; Tr. 120, 138-139). Although the bank had a policy against participation by its employees in financial ventures involving the bank, Grissom nevertheless engaged in a number of financial transactions with the bank, concealing his interest with the assistance

[1]Petitioner was acquitted on seven counts of willful misapplication of money and securities of the bank, in violation of 18 U.S.C. 656.

of petitioner (Pet. App. A-2 to A-3). Grissom also used his official position with the bank improperly to accommodate petitioner when petitioner was short of funds or was unwilling to pay for securities he and Grissom had previously agreed to purchase. In return, petitioner aided Grissom in manipulations designed to conceal from the bank's management and the Comptroller of the Currency losses sustained by the investment division.[2]

In early April 1971, petitioner and Grissom decided to purchase from the bank for $1,000,000 certain Federal Land Bank bonds to be issued on April 20. The order was placed solely in petitioner's name, although Grissom agreed to share equally in the profit or loss (Tr. 79, 210). On the date of issuance the value of the bonds had declined to $985,000, however, and petitioner failed to pay for them (Tr. 215). Grissom then caused the bank to absorb the bonds in its trading account, using $1,000,000 of the bank's funds, while he and petitioner hoped the market would improve. Meanwhile, the original purchase order was either lost or misplaced, and the bonds were held in the bank's own safekeeping account rather than in a separate account maintained by the bank for customers' bonds (Tr. 394-395).

On June 15, 1971, petitioner borrowed funds from the Houston National Bank and used the proceeds of this loan to purchase the bonds in question. An entry in the ledgers of the Planters National Bank recorded June 15 as the original purchase date of the bonds, thereby concealing the earlier commitment by petitioner to purchase

[2]Co-defendant Grissom was convicted of the same offenses as petitioner and received concurrent sentences of six months' imprisonment and 24 months' probation. The court of appeals affirmed his conviction (Pet. App. A).

the same securities on April 20, 1971. A month later petitioner resold the bonds to the bank for $965,000, a price higher than their then-current market value (Tr. 216). This transaction was recorded on the bank's books as a final sale by petitioner alone (Pet. App. F). In fact, Grissom had a financial interest in the sale as petitioner's partner, and the sale was subject to an undisclosed unwritten commitment made by Grissom, on behalf of the bank, to resell the bonds to petitioner at any time for the same price, regardless of their market value. In October 1971, petitioner exercised his option and purchased the bonds for $965,000, after which he immediately resold them to the bank for the $984,375 market price (Tr. 217-218).[3]

Petitioner and Grissom also engaged in so-called "parking" transactions whereby the bank, through Grissom, sold certain securities to petitioner at the end of a quarterly period, at a price equal to the original cost of the securities to the bank, subject to a concealed oral agreement to repurchase them at the beginning of the next period. By recording the transactions as final sales, Grissom was able to avoid listing in quarterly reports prepared for the Comptroller of the Currency that certain securities had declined in value and were being held at a loss. See 12 C.F.R. 18.6(c) (1976). Thus, Grissom was able to overstate the profits of the investment division and conceal losses on the "parked" securities. Petitioner and Grissom were convicted of engaging in several "parking" transactions between December 1972 and June 1973. In each instance,

[3]The false entries associated with the Federal Land Bank bond purchases by petitioner and Grissom were charged in counts II, IV, and VI of the indictment (Pet. App. A-16, A-17, A-18 to A-19). Evidence of several similar joint transactions between March 1971 and April 1973, involving the bank, was admitted at trial to show a pattern of conduct (Tr. 201, 218-237). See Fed. R. Evid. 404(b).

the "sale" to petitioner of the "parked" securities was recorded in the bank ledgers as final (Pet. App. A-4).[4]

On one occasion petitioner, in order to raise the cash necessary to participate in a "parking" transaction, "sold" certain debentures to the bank. This transaction was recorded in the bank ledgers as final, although it was subject to an unwritten, undisclosed understanding with Grissom that the debentures would be repurchased by petitioner (Tr. 1055, 1245-1253).[5] Grissom was discharged by the bank in June 1973, when his "parking" practices were discovered (Pet. App. A-5).

ARGUMENT

Petitioner contends (Pet. 23-42) that, because the undisclosed repurchase arrangements with Grissom were oral and therefore unenforceable under the Tennessee statute of frauds, the entries in the bank records were not false because they accurately reflected legal realities in representing transactions as final sales. We note at the outset that, in light of petitioner's receipt of concurrent sentences on the counts on which he was convicted, the Court need not review petitioner's claim as to each count if it determines that his conviction on the conspiracy count or any of the substantive counts except counts VIII and X is valid.[6] *Andresen* v. *Maryland*, 427 U.S. 463, 469,

[4]These "sales" were charged as overt acts in the conspiracy count of the indictment (Pet. App. A-12 to A-15) and as substantive counts VIII, X, and XIII (*id.* at A-19, A-20 to A-21, A-23).

[5]This false entry was charged in count XII of the indictment (Pet. App. A-22).

[6]Equal concurrent sentences of 21 months' imprisonment (all but three months of which were suspended with probation) were imposed on the conspiracy count (count I), three counts charging false entries relating to the purchase by petitioner and Grissom of the Federal Land Bank bonds (counts II, IV, and VI), and two counts

n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. Furthermore, the validity of petitioner's conviction on count II (which alleged as false the entry that petitioner was the sole owner of the Federal Land Bank bonds) does not depend upon the correctness of petitioner's statute of frauds theory.

In any event, petitioner's claim was properly rejected by the courts below. As the court of appeals noted (Pet. App. A-5 to A-6), there was ample evidence for the jury to conclude that the bank entries reflecting the so-called "final" sales of securities to petitioner were false, *i.e.*, they were "intentionally made to represent what is not true or does not exist, with the intent either to deceive [bank] officers or to defraud the association." *Agnew* v. *United States*, 165 U.S. 36, 52. The transactions recorded as final were in fact conditional upon unrevealed repurchase agreements or other terms flatly inconsistent with finality. As petitioner acknowledges, the transactions were in effect either unauthorized loans secured by the stocks or bonds being "sold" (Pet. 7) or devices designed to allow removal of certain securities from the bank's ledgers temporarily (Pet. 16). The obvious purpose was to deceive the bank's officers and the Comptroller of the Currency while advancing the personal interests of the parties to the transactions.

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relating to "parking" transactions on June 27, 1973, whereby the bank "purchased" securities from petitioner valued at $1,000,000 and "sold" to petitioner other securities valued at $700,000 (counts XII and XIII). Petitioner was also convicted of false entries relating to two other "parking" transactions (counts VIII and X). On count VIII, he was sentenced to three months' imprisonment, to run concurrently with the other sentences; imposition of sentence was suspended on count X and petitioner was placed on a concurrent term of 18 months' probation (Pet. App. W).

Petitioner's assertion that the existence of a state statute of frauds somehow transformed these false and fraudulent entries into truthful ones is insubstantial. That statute, while rendering unwritten agreements unenforceable "by way of action or defense" (Tenn. Code Ann. § 47-8-319 (1964 Repl.)), does not render them void. See, *e.g.*, *Joseph E. Seagram & Sons, Inc.* v. *Shaffer*, 310 F. 2d 668, 673 (C.A. 10), certiorari denied, 373 U.S. 948; *Hewitt* v. *Hutter*, 406 F. Supp. 976, 980 (W.D. Va.). To equate a contract term's technical unenforceability in court with its non-existence, as petitioner urges, would permit bankers to employ sham tactics to manipulate records and would thus defeat the purpose of the federal false entry statute, which is "to give assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition." *United States* v. *Darby*, 289 U.S. 224, 226. See also *United States* v. *Giles*, 300 U.S. 41, 48-49; *Phillips* v. *United States*, 406 F. 2d 599, 601 (C.A. 10). "It cannot be the law that officers of a bank may make a sham entry with the intent to deceive, and yet, merely because they go through the idle and deceitful form of making a transaction to which the entry might nominally but cannot really relate, protect themselves from the consequences of their real conduct. Such a holding would facilitate the vicious practice condemned by law." *Billingsley* v. *United States*, 178 Fed. 653, 663 (C.C.A. 8). Indeed, petitioner's claim that the transactions in issue were actually final sales because of the statute of frauds rings especially hollow in light of the fact that, in every instance, the allegedly unenforceable repurchase agreements were honored.

Nor is petitioner correct in asserting that the only alternative to entering the sales as final would have been to record the repurchase agreements themselves as though they were binding, which may have been equally deceptive (Pet. 27). On the contrary, options existed that would

have eiiminated the deceptive character of the entries. The entries reflecting sales of securities could have omitted reference to their finality and could instead have contained notations revealing the existence of oral understandings materially affecting the transactions. The agreements to repurchase could also have been reduced to writing and appropriately published. Of course, if the truth had been known, the bank undoubtedly would have nullified the transactions and would have taken disciplinary action against Grissom. Finally, compliance with the statute could have been assured by one alternative petitioner fails to discuss: not to engage in the conditional sales with Grissom at all. See *Minor* v. *United States*, 396 U.S. 87, 97.

United States v. *Docherty*, 468 F. 2d 989 (C.A. 2), upon which petitioner relies, is inapposite. In that case the court of appeals held that Section 1005 was not violated by a defendant who had been deceived by his friend, a bank employee, into borrowing money from the bank and giving it to the friend. Not only were the entries on the bank's ledger in *Docherty* made without criminal intent on the part of the defendant, but also they were totally accurate to describe the apparent as well as the actual substance of the loan transactions. By contrast, petitioner was an experienced dealer in securities and a conscious partner to the sham transactions falsely reflected in the records of the bank. The entries here did not reflect actual transactions exactly as they occurred. By the same token, the decision below is not inconsistent with cases involving truthful entries of fraudulent transactions (*e.g.*, *State* v. *Heron*, 94 Ariz. 81, 381 P. 2d 764 (Sup. Ct.) or other wrongful conduct committed by a bank official that did

not affect the accuracy of the entries he made in the bank's records (*e.g.*, *Crenshaw* v. *United States*, 116 F. 2d 737 (C.A. 6)).[7]

In sum, petitioner's claims amount to nothing more than that he and Grissom believed that the book entries actually reflected the financial transactions that had occurred and that they therefore acted without criminal intent. The jury found otherwise on the basis of substantial evidence that petitioner and Grissom intended to defraud the bank and to deceive the bank's officers and the Comptroller of the Currency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MERVYN HAMBURG,
SARA CRISCITELLI,
Attorneys.

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[7]Petitioner also contends (Pet. 42-44) that his conspiracy conviction cannot stand because count 1 charged an unlawful agreement to commit two criminal acts, and the proof at best showed a conspiracy to commit only one of the offenses. Since, as we have shown, petitioner was properly convicted of causing a number of false entries to be made on the bank's ledgers, his conspiracy conviction was also valid.

*The Solicitor General is disqualified in this case.